



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 12, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0688

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 113224.

The Texas Department of Health (the "department") received a request for any reports generated from any site surveys of Wilson N. Jones Memorial Hospital from January 1, 1990 to the present. You claim that many portions of the requested documents are excepted from disclosure by section 552.101 of the Government Code in conjunction with several confidentiality statutes. You have submitted the requested information at issue and have marked the information you seek to withhold.

Sections 552.301 and 552.302 require a governmental body to release requested information or to request a decision from the attorney general within ten business days of receiving a request for information the governmental body wishes to withhold. When a governmental body fails to request a decision within ten business days of receiving a request for information, the information at issue is presumed public. *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379 (Tex. App.--Austin 1990, no writ); *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). The governmental body must show a compelling interest to withhold the information to overcome this presumption. *See, e.g.*, Open Records Decision No. 150 (1977) (presumption of openness overcome by showing that information is made confidential by another source of law or affects third party interests).

The department received the request for information on October 28, 1997. You did not request a decision from this office until December 16, 1997. Consequently, you failed to request a decision within the ten business days required by section 552.301(a) of the Government Code. Thus, as you assert that the requested information is made confidential

by other laws, we will examine whether the documents at issue are public and must be disclosed.¹

We point out initially that several of the submitted documents are HCFA 2567 forms. Federal regulations require the department to release the HCFA 2567 statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988) at 5. Here, the reports are signed by a providers' representatives and the "providers' plans of correction" portion of the report appears to contain the providers' comments to the reports. Thus, we believe that the providers have had a reasonable opportunity to review and comment on the reports. Consequently, the requested HCFA statements must be released.

You ask several questions about the release of these statements in their entirety. We have previously answered your questions. In Open Records Letter No. 97-2843 (1997), we stated that federal law requires the department to release deidentified HCFA 2567 documents. Open Records Letter No. 97-2843 (1997) (*citing* Open Records Letter Nos. 1514(1997), 1492 (1997), 1472 (1997), 1388 (1997), 1230 (1997)). We stated that in most instances, a patient's medical condition or diagnosis does not identify that patient when the name is redacted from the HCFA form. *Id.* We also found that because the federal provisions govern the public disclosure of the HCFA 2567 forms, the federal law prevails to the extent it may conflict with the Texas Medical Practice Act or other state statutes regarding information obtained from medical records. *Id.* (*citing English v. General Electric Co.*, 110 S.Ct. 2270, 2275 (1990) (state law preempted to extent it actually conflicts with federal law)). We also opined in that decision that the deidentification required by federal law is sufficient to protect the privacy interests of the patients. *See Star Telegram, Inc. v. Doe*, 915 S.W.2d 471, 474-475 (Tex. 1995). Accordingly, you must release the requested HCFA statements with deletions of information that identifies the persons specified in the regulations.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Subchapter G of Chapter 241 of the Health and Safety Code provides for the disclosure of health care information in the possession of hospitals. Section 241.152(a) of the Health and Safety Code provides that "a hospital or an agent or employee of a hospital may not disclose health care information about a patient to

¹A claim under the informer's privilege may be waived by the governmental body since the privilege belongs to the government. *See* Open Records Decision No. 549 (1990) at 6. We conclude that the informer's privilege is not a compelling exception in this instance and, therefore, may not be used to withhold any of the requested information from required public disclosure under section 552.101.

any person other than the patient without the written authorization of the patient or the patient's legally authorized representative." "Health care information" means "information recorded in any form or medium that identifies a patient and relates to the history, diagnosis, treatment, or prognosis of a patient." Health & Safety Code § 241.151(1). Section 241.153(3) provides several instances in which a patient's health care information may be disclosed without the patient's written authorization. One such instance is if the disclosure is to "a federal, state, or local government agency or authority to the extent authorized or required by law." *Id.* § 241.153(3). There is no provision which addresses the re-release of the health care information by the department. Therefore, we do not believe that section 241.152 is applicable in this instance. You may not withhold any information under section 241.152 of the Health and Safety Code.

You next argue that portions of the documents must be withheld as confidential medical records. We agree. Section 5.08 of V.T.C.S. article 4495b, the Medical Practice Act (the "MPA"), applies to "[c]ommunications between one licensed to practice medicine, relative to or in connection with any professional services as a physician to a patient" and "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." The submissions contain not only medical records and communications, but also information that appears to have been obtained from those medical records and communications. Both are confidential and may be disclosed only in accordance with the MPA. *See* V.T.C.S. art. 4495b, § 5.08(a), (b), (c), (j); Open Records Decision No. 598 (1991), 546 (1990) (because hospital treatment is routinely conducted under supervision of physicians, documents relating to diagnosis and treatment during hospital stay would constitute protected MPA records). We have marked the information that must be withheld under this statute.

Section 611.002 of the Health and Safety Code, which pertains specifically to mental health patients, applies to "[c]ommunications between a patient and a professional, [and] records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional." *See also* Health and Safety Code § 611.001 (defining "patient" and "professional"). The submissions contain not only a professional's records and communications, but also information that appears to have been obtained from such records and communications. Both may not be released except in accordance with sections 611.004 and 611.0045 of the Health and Safety Code. Health and Safety Code § 611.002(b); *see id.* §§ 611.004, 611.0045. We have marked in brackets the information that must be withheld under sections 611.002 - 611.0045.

You also claim that three reports in their entirety must be withheld under section 48.101 of the Human Resources Code. Section 48.101 provides in pertinent part as follows:

(a) The following information is confidential and not subject to disclosure under Chapter 552, Government Code:

(1) a report of abuse, neglect, or exploitation made under this chapter;

(2) the identity of the person making the report; and

(3) except as provided by this section, all files, reports, records, communications and working papers used or developed in an investigation made under this chapter of in providing services as a result of an investigation.

The Seventy-fifth Legislature amended subsection (b) of section 48.101 to read as follows:

(b) Confidential information may be disclosed only for a purpose consistent with this chapter and as provided by department or investigating state agency rule and applicable federal law.

Hum. Res. Code § 48.101(b).² We have reviewed the information that the department has marked under the statute. We agree that section 48.101(a) makes the information confidential. The department's rules do not permit the disclosure of the information to the requestor. 25 T.A.C. § 1.207. Thus, we have marked the information that the department must not release under section 48.101.

Finally, section 552.101 of the Government Code also encompasses common-law and constitutional privacy. Common-law privacy excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

The constitutional right to privacy protects two interests. Open Records Decision No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *See id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. *See* Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the

²Act of May 31, 1997, S.B. 359, § 58, 75th Leg., R.S.

common law; the material must concern the "most intimate aspects of human affairs." *See* Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).³ We have marked in brackets the information you must withhold based on a right of privacy.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 113224

Enclosures: Marked documents

cc: Mr. Robert Schwab
Robinson & Schwab, L.L.P.
101 East Park Boulevard, Suite 769
Plano, Texas 75074
(w/o enclosures)

³We note that common-law and constitutional privacy rights lapse upon the death of the subject. *See* Open Records Decision No. 272 (1981) at 1.